Mayban Finance (Singapore) Ltd v Yap Thiam Sen & Anor

HIGH COURT (SINGAPORE) — SUIT NO 4 OF 1988
THEAN J
30 APRIL 1990

Contract — Master recourse agreement — Agreement between finance company and firm in respect of obligations of hirers proposed by firm to finance company — Construction of terms of master recourse agreement — Whether firm liable to finance company under master recourse agreement if hirers not in default

Partnership — Cessation of partnership — Liability of withdrawing partner — Agreement entered between firm and finance company in respect of obligations of hirers proposed by firm to finance company — Finance company not preventing firm from collecting instalments after withdrawal of one partner of firm — Notice of withdrawal — Notice of termination of agreement — Liability for all transactions as at date of notice of termination

Civil Procedure — Summary judgment — Whether triable issues in respect of claims by finance company arising in connection with master recourse agreement — Whether statement of claim lacking in particulars is bad or defective

The plaintiffs are a finance company and the two defendants were partners of a firm ('Fulsoon') carrying on the business of motor car dealers. They entered into a master recourse agreement (the 'master agreement') under which the defendants agreed, inter alia, to indemnify the plaintiffs against all losses suffered in connection with the plaintiffs having entered into hire purchase agreements with hirers proposed by the defendants and accepted by the plaintiffs.

On 5 October 1984, the first defendant informed the plaintiffs by a letter dated 6 October 1984 that he was withdrawing as a partner from Fulsoon. The letter was received by the plaintiffs on 9 October 1984. The plaintiffs brought an action against the two defendants for amounts due and owing by the defendants under the master agreement in respect of hire purchase transactions entered into by the plaintiffs with hirers prior and up till 9 October 1984. The plaintiffs were appealing against the decision of the registrar which allowed the defendants unconditional leave to defend the entire claim.

The plaintiffs claimed the following sums:

(i) total amounts paid by hirers to Fulsoon but not remitted to the plaintiffs;
(ii) interest on the overdue amounts in (i);
(iii) amount of loss suffered by the plaintiffs on the exercise of their right to possess a vehicle;
(iv) total amounts of instalments collected by Fulsoon but not remitted to the plaintiffs; and
(v) interest on the overdue instalments in (iv).

As regards claims for items (i) and (iv), the defendants argued that:

(i) The plaintiffs had failed to deliver a good statement of claim as it was lacking in particulars.
(ii) As the master agreement was terminated on 9 October 1984, if the hirers were not in default as at that date, the first defendant could not be held liable.
(iii) As there was no default on the part of hirers under the hire purchase agreements, the first defendant could not be made liable.
(iv) As the first defendant's partnership with the second defendant ceased on 6 October 1984 he could not be made liable for any hire purchase agreements entered into on or after 6 October 1984.
(v) Some of the moneys claimed under items (i) and (iv) were paid to the second defendant who was then the sole proprietor of Fulsoon and the first defendant could not be made liable as he had by then ceased to be a partner of Fulsoon.
(vi) The plaintiffs had terminated the master agreement on 23 October 1985 and yet 'allowed' the second defendant to collect instalments from the hirers.

Held, allowing the plaintiffs' claim in part:

(1) There were triable issues in respect of the claim for items (ii), (iii) and (v). The amounts in (ii) and (v) were interests on overdue amounts and it was not clear how the plaintiffs became entitled to payment of such interest. In respect of item (iii), the first defendant had raised the question whether the plaintiffs had properly exercised their right of possession over the motor vehicle involved and that they had failed to mitigate their loss. The plaintiffs' claim for these three amounts should proceed to trial.

(2) The plaintiffs should be given judgment for items (i) and (iv) as the defendants had no defence to those claims for the following reasons:

(i) Although the statement of claim lacked particulars, the fact that the defendants had successfully applied for and successfully obtained further particulars did not imply that the statement of claim was bad or defective.
(ii) The plaintiffs treated the first defendant's notice of 9 October 1984 as a notice of termination of the master agreement, the termination taking effect on 9 October 1984. The termination of the master agreement did not result in the termination and discharge of the obligations of the defendants thereunder which had accrued and were outstanding as at the date of termination. Such obligations had been specifically preserved by cl 15 of the master agreement. As the amounts claimed in paras (i) and (iv) arose out of transactions entered into by the plaintiffs prior to and as at 9 October 1984, the first defendant was liable to pay those amounts.
(iii) The defendants' obligations to the plaintiffs were based on the provisions of the master agreement. So long as the plaintiffs had not received any of the payments due from any of the hirers, by reason of the default of the hirers or otherwise, the defendants were obliged to make those payments to the plaintiffs. It was not a defence that none of the hirers was in default and that the amounts had been paid to Fulsoon, or that Fulsoon or the defendants had not received the payments. It was not a defence that some of the moneys claimed under items (i) and (iv) had been paid to the second defendant who was then the sole proprietor of Fulsoon.
(iv) Section 17(2) and s 36(1) of the Partnership Act 1890 [UK] made it clear that the plaintiffs were entitled to treat the first defendant as being a member of the firm until they received notice of the change in the constitution of the firm. The master agreement was made by both the defendants with the plaintiffs. Even if the partnership ceased on 6 October 1984, the partners remained liable thereunder. The first defendant only gave notice of his withdrawal to the plaintiffs on 9 October 1984 and the plaintiffs treated it as a notice of termination of the master agreement and thus vis-a-vis the first defendant, the plaintiffs were entitled to treat the master agreement as

terminated on 9 October 1984 and the first defendant was liable for all transactions made by the plaintiffs as at 9 October 1984.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 141 of 1989.]

Legislation referred to
Partnership Act 1890 [UK] ss 17(2), 36(1)

Johnny Cheo for the plaintiffs.
B Ganesh for the defendants.

Cur Adv Vult

Thean J: The plaintiffs are a finance company, and the two defendants were, at the material time, partners of a firm carrying on the business of car dealers under the name and style of Fulsoon Enterprise ('Fulsoon'). On 31 January 1983, the defendants entered into a master recourse agreement with the plaintiffs ('the master agreement'), under which the defendants would propose intending hirers of motor vehicles to the plaintiffs for granting hire purchase facilities, and in consideration of the plaintiffs granting such facilities to the hirers, the defendants agreed, inter alia, to guarantee the due performance and observance by the hirers of the terms and conditions of each of the hire purchase agreements thereafter made between the plaintiffs and such hirers, and to indemnify the plaintiffs against all loss or damage suffered and all claims, costs and expenses made or incurred by the plaintiffs in any way arising out of or consequent upon the plaintiffs having entered into such hire purchase agreements. On 5 October 1984, the first defendant by a letter dated 6 October 1984, informed the plaintiffs that he had withdrawn as a partner from the firm of Fulsoon, but the letter was received by the plaintiffs only on 9 October 1984. In response, the plaintiffs by their letter of 18 January 1985 informed the first defendant that he would be liable for all transactions entered into by the hirers up to 9 October 1984 and that the amount outstanding as at that date was $647,227.15. Subsequently, the master agreement with the second defendant was terminated by the plaintiffs on 23 October 1985.

On 4 January 1988, the plaintiffs instituted this action against the two defendants claiming the sum of $85,028.27 being the amount due and owing by both of them under the master agreement in respect of hire purchase transactions entered into by the plaintiffs with the hirers (proposed by the defendants) up to 9 October 1984. Though the action was commenced against both the defendants, the plaintiffs have, hitherto, pursued the claim only against the first defendant, which they are entitled to do, as under the master agreement the obligations of the defendants are joint and several. On an application for summary judgment, the assistant registrar gave to the first defendant unconditional leave to defend the entire claim of the plaintiffs. Against that decision, the plaintiffs appealed, and the appeal was heard before me. At the conclusion of the appeal, on 13 November 1989, I allowed the appeal in part, set aside the order of the assistant registrar, gave judgment to the plaintiffs in the sum of $59,728.71 and costs, and gave to the first defendant unconditional leave to defend the balance of the claim. I now give my reasons.

The amount for which I allowed judgment to be entered for the plaintiffs was computed or arrived at on the following basis. The amount claimed by the plaintiffs is $85,028.27, which comprises the following sums, as more particularly set out in the schedule ('the schedule') annexed to the statement of claim:

(i)	The total of the amounts paid by hirers to Fulsoon to complete the purchases but not remitted to the plaintiffs as set out in Part I of the schedule	$51,200.04
(ii)	Interest on the overdue amount up to 28 October 1987	$ 7,217.10
(iii)	The amount of loss sustained by the plaintiffs on their exercise of right of possession of a vehicle, 1981 Mazda Lorry YE 5535 J under the purchase agreement made with Clipper Express Transportation, as set out in Part II of the schedule	$ 6,405.07
(iv)	The total amounts of instalments collected by Fulsoon and not remitted to the plaintiffs	$17,709.72
(v)	Interest on the overdue instalments up to 28 October 1987, ie the amount in (iv)	$ 2,496.34
		$85,028.27

On the basis of the affidavits filed and the documents exhibited, I find that the defendants have no defence to the claim for the two amounts itemized in (i) and (iv) above totalling $68,909.76; item (i) is in Part I and item (iv) in Part III of the schedule. Voluminous documents have been produced and deposed to in affidavits in support of the computations of these sums, and in respect of Parts I and III of the schedule, the first defendant did not really dispute the quantum; the dispute was mainly on the liability. In addition, the first defendant contended that Fulsoon was entitled to commission payable in respect of the transactions entered into by the plaintiffs, from which these two sums were derived. The countervailing argument of the plaintiffs on the commission is that under the master agreement the first defendant is not entitled to any commission until the full amount is paid up. This is a triable

issue. On the basis of the plaintiffs' computation, if the first defendant is entitled to commission, a sum of $9,181.05 is payable to the defendants; accordingly I deducted this amount from the sum of $68,909.76, thus leaving a balance of $59,728.71.

In my opinion, there are also triable issues raised in respect of the claim for the amounts itemized in (ii), (iii) and (v). The amounts in (ii) and (v) are interests on overdue amounts, and it is by no means clear how the plaintiffs become entitled to payment of such interests. As for the amount in (iii) which is in Part II, the first defendant has raised the question whether the plaintiffs had properly exercised their right of possession of the motor vehicle involved, and there was a suggestion that the plaintiffs had failed to mitigate their loss in respect of that vehicle. Hence, the plaintiffs' claim for these three amounts should proceed to trial.

I now turn to the defences raised on behalf of the first defendant on the liability for the amounts in Parts I and III of the schedule. First, it was submitted that the plaintiffs had failed to file and deliver a complete and good statement of claim. The basis for making this submission is that the first defendant, after having been served with the statement of claim, had successfully applied for particulars thereof. In my opinion, there is nothing fundamentally wrong or defective in the statement of claim; it may lack particulars, and the first defendant is at liberty to apply for particulars, which they did, and the fact that he successfully obtained the particulars does not, by implication, mean that the statement of claim is bad or defective. This argument has no merit whatsoever, and I rejected it.

The next argument made on behalf of the first defendant turns on the true construction of cl 15 of the master agreement. That clause provides:

> This agreement may be terminated by either party giving to the other one calendar month's notice in writing to that effect. In the event of such termination the dealer shall continue to be liable in respect of all transactions entered into by the company prior to the expiration of such notice. It is hereby agreed that in the event of a breach of any of the terms stipulations and conditions of this agreement by the dealer the company shall be entitled to give immediate notice and terminate this agreement.

The first defendant, by his notice of 6 October 1984, informed the plaintiffs that he had ceased to be a partner of Fulsoon, and the notice was received by the plaintiffs on 9 October 1984. The plaintiffs had treated this as a notice of termination of the master agreement, the termination taking effect on 9 October; they had thereby waived the one-month's notice required under cl 15. Counsel for the first defendant submitted that the words 'in respect of all transactions' in cl 15 referred only to the hire purchase transactions entered into by the plaintiffs with the hirers prior to 9 October; that as the master agreement was terminated on 9 October, all the clauses therein ceased to have effect, and that, in consequence, if the hirers, for whom the defendants had by the master agreement given the guarantee and indemnity, were not in default as at that date, the first defendant could not be held liable. This argument is totally misconceived. It is clear that cl 15 provides for the parties to the master agreement a right to terminate the agreement by giving not less than one month's notice in writing, and the plaintiffs, in addition, have a right to terminate the agreement by giving 'immediate notice' in the event of a breach of any of the terms, stipulations and conditions of the agreement by the defendants. A termination of the agreement does not necessarily entail a termination or discharge of the obligations and liabilities of the defendants thereunder, which have accrued and are outstanding as at the date of termination. Such obligations and liabilities are specifically preserved by the provision in the second part of cl 15, which says that, on termination of the agreement, the defendants 'shall continue to be liable in respect of all transactions entered into by the [plaintiffs] prior to the expiration of such notice'. The obligations of the defendants in respect of transactions entered into by the plaintiffs, ie the hire purchase agreements made between the plaintiffs and the hirers in question, are spelt out in cll 8, 9 and 10 of the master agreement, which, insofar as relevant, are as follows:

> 8 In consideration of the company providing the facilities set forth in this agreement and entering into hire purchase agreements with the hirers at the request of the dealer the dealer hereby guarantees to the company the due performance and observance by the hirers of all the terms stipulations and conditions of each and every hire purchase agreement so entered into and undertakes to indemnify the company against all damage, losses, costs and expenses whatsoever (including legal costs as between solicitor and client) which the company may incur or sustain in respect of or arising out of each and every such hire purchase agreement including misrepresentation by a hirer and also by reason of any purported resale of the goods, the subject matter of any hire purchase agreement.
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> 9 In amplification of the foregoing the dealer will indemnify and keep indemnified the company its successors and assigns from all loss or damage suffered and all claims costs and expenses (including legal costs as between solicitor and client) made against or incurred by the company in any way arising out of or consequent upon the company having entered into such hire purchase agreement whether arising out of a breach by the hirer or any of the terms stipulations and conditions thereof or otherwise including any such loss or damage claims costs and expenses as aforesaid as may arise from the said hire purchase agreement being or become (for whatever reason) void or unenforceable against the hirer. Provided that upon payment by the dealer in full of all the liability hereunder the company will assign to the dealer all the rights (if any) in or arising out of the said hire purchase agreement.

10 Without prejudice to the generality of the foregoing the dealer hereby agrees and undertakes as follows, that is to say:

(a) the dealer shall collect and remit to the company punctually on dates to be specified by the company all sums payable under each and every hire purchase agreement entered into by the company at the request of the dealer;

(b) in default of payment of all or any such sums by the hirer the dealer shall without any formal demand pay the same to the company;

(c) in the event of the hirer completing the purchase of the goods comprised in the hire purchase agreement by paying to the dealer the net balance due under the hire purchase agreement the dealer shall forthwith notify the company and pay to the company the net balance paid to him/it;

(d) in the case of a hirer committing any breach of the terms stipulations and conditions of a hire purchase agreement, the dealer shall on demand pay forthwith to the company the total amount of all instalments and other sums payable under the hire purchase agreement in order to complete the purchase of the said goods and unpaid at the date of the breach; ...

These provisions remain in full force and effect in respect of the hire purchase transactions entered into by the plaintiffs as at 9 October 1984 and the amounts stated in Parts I and III of the schedule to the statement of claim arose out of such transactions, and the defendants are liable under these provisions to pay the amounts.

It was argued on behalf of first defendant that the plaintiffs' claim was based on defaults on the part of the hirers and that, as evident from Parts I and III of the schedule, there was no default on their part under the respective hire purchase agreements, because the payments stated therein had been made to Fulsoon. The answer to this is that the defendants' obligations under the plaintiffs' claim are based on the provisions of the master agreement. In this connection, it should be noted that these provisions are very broad and stringent. Clauses 8 and 9 are provisions containing a guarantee and an indemnity by the defendants to the plaintiffs in very wide terms; cl 10 by the numerous paragraphs therein extends the defendants' obligations even further. By paras (a) and (b) of cl 10, the defendants are obliged to collect and remit to the plaintiffs all sums payable under each of the hire purchase agreements (proposed by the defendants), and if any of the hirers defaults in any such payment, the defendants are obliged to pay the same to the plaintiffs, and by para (c) thereof, if any hirer completes the purchase of the goods (comprised in the hire purchase agreement in question) by paying to the defendants the balance due, the defendants are obliged to pay such amount to the plaintiffs. The net effect of all these provisions is that if and so long as the plaintiffs have not received any of the payments due from any of the hirers under the hire purchase agreement, whether by reason of default of such hirer or otherwise, the defendants are obliged to make good the payment to the plaintiffs. Hence, it is not a defence to the plaintiffs' claim that none of the hirers is in default, as they have all made the payments to Fulsoon; nor is it a defence to say that Fulsoon or the defendants have not received such payments. What is relevant is the receipt by the plaintiffs of the payments due under the hire purchase agreements, and they have not received the amounts set out in Parts I and III of the schedule.

It was further contended on behalf of the first defendant that his partnership with the second defendant ceased on 6 October 1984 and therefore he could not be liable in respect of any hire purchase agreement entered into by the plaintiffs on or after 6 October 1984. The argument has absolutely no merit, and I again rejected it without hesitation. First, s 17(2) of the Partnership Act 1890 of the United Kingdom, which is applicable here, provides:

> A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

And s 36(1) of the Act provides:

> Where a person deals with firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

Secondly, the agreement was made by both the defendants with the plaintiffs, and even if their partnership ceased on 6 October 1984 they remain liable thereunder. The first defendant gave notice of his withdrawal from the partnership to the plaintiffs only on 9 October 1984 and the plaintiffs had agreed to treat that as the notice of termination under cl 15, and thus vis-a-vis the first defendant to treat the master agreement as terminated on 9 October 1984. Hence, under cl 15, the first defendant is liable in respect of all transactions entered into by the plaintiffs as at 9 October 1984.

In addition to those general defences on liability, the first defendant also raised a defence with reference to certain specific sums in Part I and Part III of the schedule. He maintained that he was not liable for the amounts stated in items 2, 3, 4 and 5 of Part I, totalling $23,996.46, as these amounts were paid to the second defendant, being then the sole proprietor of Fulsoon; the first defendant had by then ceased to be a partner of Fulsoon. This argument I am unable to accept. As I have said before, notwithstanding the termination of the master agreement by the first defendant, his obligations under the agreement by virtue of cl 15 thereof continue to subsist. Those sums were at the material dates due and payable to the plaintiffs under the respective hire

purchase agreements, and these agreements were entered into before 9 October 1984. As the instalments were not paid to the plaintiffs on the due dates, the defendants are obliged to pay them under the master agreement, and it is immaterial whether or not they were paid to Fulsoon; in the circumstances it is certainly not a defence that the amounts had been paid to Fulsoon.

With regard to Part III of the schedule, the first defendant disputed the amounts in terms 4 and 11 thereof on the ground that since the plaintiffs had terminated the master agreement on 23 October 1985, they had resorted to direct collection of the instalments due from the hirer, and yet they 'allowed' the second defendant to collect these instalments in question. All that the schedule says was that these instalments were paid to Fulsoon and there is nothing there to suggest that the plaintiffs 'allowed' Fulsoon to collect them. In my view, the fact that these instalments were paid to the second defendant or Fulsoon is no defence to the claim for these amounts.

In the result, I held that the plaintiffs were entitled to judgment in the sum of $59,728.71, and I so ordered.

Order accordingly.

Solicitors: *Shook Lin & Bok; Lim Ganesh & Liu.*

Reported by *Teoh Ai Lin*

MALAYSIAN REPORTS

Public Prosecutor v Dat ak Tuni

HIGH COURT (KUCHING) — CRIMINAL REVISION NO 2 OF 1990
HAIDAR J
2 OCTOBER 1990

Criminal Procedure — Fitness to plead — Whether accused is of sound mind and capable of making defence — Principles applicable — Whether court need be concerned with state of mind of the accused at the time of offence — Whether accused can be detained in safe custody without a finding that he is of unsound mind and incapable of making a defence — Penal Code (FMS Cap 45), ss 302 & 304 — Criminal Procedure Code (FMS Cap 6), ss 178(iii), 325, 342, 343(i), (ii) & 344

The accused was charged with an offence under s 304 of the Penal Code. He was initially sent to the Sarawak Mental Hospital for observation when a magistrate suspected that he was of unsound mind, after which the Medical Superintendent of the hospital certified that the accused was fit to stand trial and plead in court. However, the sessions court judge, before whom the matter came up, did not take a plea but adjourned the case and requested further details of the accused's previous psychiatric illness and his mental state at the time of the accident. It was again reported that the accused was fit to stand trial. The charge was then put to the accused whereupon he said he understood the charge and did not do it purposely and did not know why he killed his father. The sessions court judge took the view that the accused was unable and incapable of making his defence, and ordered that he be detained in a mental hospital for safe custody under s 344 of the Criminal Procedure Code ('CPC') pending the order of the Yang Di-Pertuan Negeri Sarawak. The deputy public prosecutor then applied to the court to exercise its revisionary powers under s 325 of the CPC in respect of the order made by the sessions court judge.

Held, setting aside the order of the sessions court:

(1) In spite of the first medical report certifying the accused fit to plead, the learned sessions court judge went one step further by saying that 'the mental state of the accused at the time of the alleged offence is relevant', and required further details of the accused's previous psychiatric illness and his mental state at the time of the incident. It would appear therefore that the learned sessions court judge was unduly concerned about the mental state of the accused at the time of the commission of the offence. This is an error. The learned sessions court judge's duty is to inquire into the state of mind of the accused at the time the trial is being held as provided under s 341 of the CPC.

(2) When the case was first mentioned before the sessions court and on the face of the Medical Superintendent's report, the charge should have been read to the accused for the accused to plead. If, however, the learned sessions court judge was of the opinion that the accused was not fit to plead in spite of the report by the Medical Superintendent (presumably because of the lapse of time of the issuance of the report and the trial) she should have invoked s 342 of the CPC.

(3) The plea entered by the accused appears to be equivocal and must be treated as one of not guilty. The court should proceed to try the case as required by s 178(iii) of the CPC. In